1959

Edward A. Knaus and Edna Knaus v. James Earl Smith and Zelda P. Smith et al : Brief of Appellants

Utah Supreme Court

W. D. Beatie; Attorney for Appellants and Plaintiffs;

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWARD A. KNAUS and EDNA KNAUS, his wife,
Plaintiffs and Appellants.

—vs.—

JAMES EARL SMITH and ZELDA P. SMITH, his wife, R. V. MANNING and LOIS MANNING, his wife,
Defendants and Respondents.

Case No. 9071

APPELLANTS' BRIEF

W. D. BEATIE
Attorney for appellants and plaintiffs

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STATEMENT

This is an appeal from the judgment made and entered by the Honorable A. H. Ellett, of the Third Judicial District, in and for Salt Lake County, State of Utah, on the 8th day of April, 1959, and made final by the denial of a motion for a new trial on April 27, 1959.

The complaint alleges as follows:

"Plaintiffs complain of defendants and for cause of action allege:

1. That the plaintiffs and the defendants Manning are residents of Salt Lake County, Utah, and the defendants Smith are residents of Los Angeles, California.

2. That the plaintiffs are now and by their predecessors for a long time hereto have been the owner and in possession of that certain parcel of land situate, lying and being in the County of Salt Lake, State of Utah, and more particularly described as follows, to-wit:

> All of Lot 2, except the east 10 feet thereof, of Bradford Subdivision, a subdivision of part of Sections 7 and 8, Township 2 South, Range 1 East, Salt Lake Meridian.

3. That the said defendants claim and assert interest thereon adverse to the plaintiffs and that the claims of said defendants are without any rights whatsoever, and that the said defendants have not, nor have any of them, any estate, right, title or interest whatsoever in said land or premises or any part thereof.

WHEREFORE, plaintiffs pray that said defendants may be required to set forth the nature of their claims and that all adverse claims of said defendants or either or any of them, may be determined by a decree of this court; and that by said decree it be declared and adjudged that said plaintiffs are the owners of said premises and that the defendants or either or any of them have no estate or interest whatsoever in or to said land and premises; and also that said defendants and each and every one of them be forever debarred from asserting any claim whatsoever in or to said land and premises adverse to the plaintiffs; and for such further relief as in equity is meet and just.

W. D. BEATIE
Attorney for plaintiffs

The answers of the defendants are identical and are as follows:

FIRST DEFENSE

1. Admit the allegations of paragraph 1 of said complaint.

2. Deny the allegations of paragraph 2.

3. Admit that these defendants claim an interest in and to a portion of the property described in paragraph 2, and deny the other allegations of paragraph 3.

SECOND DEFENSE

1. Allege and plead in bar of the action of the plaintiffs that as to the property hereinafter described an adjudication was made between the plaintiffs and person in privy with them on the one hand and the defendants, actually or by privity of contract in an action entitled R. V. Manning and Lois Manning, his wife, plaintiffs, vs. Ira P. Packard and Florence P. Packard, his wife, being case No. 113422 in the Third District Court for Salt Lake County, Utah.

2. That in the said action a decree was entered, together with findings of fact and conclusions of law on or about the 27th day of February, 1958, resolving said action in favor of plaintiffs Manning.

3. That said decree adjudicated and determined that the said Mannings are in possession of and entitled to the use and occupancy of the following described strip of land:

> Commencing at a point North 83°15′ West 10 feet, and South 221.57 feet from the Northwest corner of Lot 1, Bradford Subdivision, Salt Lake County, Utah, and running thence

North 81°10′ West 7.68 feet; thence Northerly 221.57 feet more or less to the North line of Lot 2, Bradford Subdivision aforesaid, to a point North 83°15′ West 16 feet from the Northwest corner of Lot 1 aforesaid, thence South 83°15′ East 6 feet, thence South along a line 10 feet West of the West line of Lot 1 aforesaid 221.57 feet to the place of beginning.

4. These defendants claim no interest in any of the property described in the complaint, except the land described in the next preceding paragraph.

WHEREFORE, these defendants pray that the action of the plaintiffs be abated upon the determination that adjudication of the only disputed strip of land between the parties has been made in an action in the Third District Court of Salt Lake County, Utah, wherein the parties to this action or their privies were parties and that there is no other dispute between these parties;

And, further, if the controversy has not already been determined in a manner whereby these parties are bound, then that the court determine that plaintiffs have no right, title or interest in and to that portion of the land which is described in paragraph 3 of this second affirmative defense and that defendants have their costs incurred in this action.

RAY, QUINNEY & NEBEKER
By C. PRESTON ALLEN

RICHARDS, BIRD & HART
By RICHARD L. BIRD

Attorneys for Defendants

The reply of plaintiffs to defendants answers is as follows:

1. Replying to paragraphs 1, 2 and 3 of the Second Defense of said answer, these plaintiffs deny the same.

2. Replying to paragraph 4 of the Second Defense of said answer, these plaintiffs admit the same.

W. D. BEATIE
Attorney for plaintiffs

The Honorable Joseph G. Jeppson at the pre-trial of this matter on February 26, 1959 included the following:

"THE COURT: Defendants in this action made a motion to amend their pleadings and counter-claim, requesting that the Court quiet title in the defendant to the 6 foot strip of land in question here. The Court granted permission to file a counter-claim not inconsistent with the grounds hereinafter set forth:

The defendants allegations in the counter-claim are to be that the defendants are entitled to have title quieted only on the grounds:
(1) that they are the owners of the disputed strip to establishment of the western boundary thereof by acquiescence; and

(2) that the disputed strip was an appurtenance to the purchase of the house on the grounds owned by the defendants when it was purchased from the common owner of both pieces.

The plaintiffs' reply to the counter-claim to be set forth herein by general denial. This pre-trial order does not bar the plaintiff from filing a reply to the counter-claim and to the new defenses introduced in this pretrial order."

The Counterclaim of the defendants filed the day before the trial of this matter is as follows:

> "For their Counterclaim permitted in the Pretrial Order, defendants allege:
> 1. Defendants are the owners of and are in lawful possession and entitled to possession of a strip of land described as follows, to-wit:
>
> > Commencing at a point North 83°15′ West 10 feet and South 221.57 feet from the Northwest corner of Lot 1, Bradford Subdivision, Salt Lake County, Utah, and running thence North 81°10′ West 7.68 feet; thence Northerly 221.57 feet more or less to the North line of Lot 2, Bradford Subdivision aforesaid, to a point North 83°15′ West 16 feet from the Northwest corner of Lot 1 aforesaid, thence South 83°15′ East 6 feet, thence South along a line 10 feet West of the West line of Lot 1, aforesaid 221.57 feet to the place of beginning.
>
> 2. The defendants are the owners of said strip by virtue of long continued acquiescence in the boundary thereof by the parties on both sides of said western boundary.
>
> 3. Defendants are the owners of said strip and are entitled to the possession and use thereof as an appurtenance to the land lying to the east of said strip, it having passed to the predecessors in interest of defendants Manning, the same being the defendants Smith, by purchase from a common owner of the land now owned by the defendants and the plaintiffs including the said described strip of land.
>
> WHEREFORE, defendants pray judgment against the plaintiffs that they be decreed to have no right, title or interest in and to the said described strip of land and that defendants have

judgment that they are the true and rightful owners thereof, and for their costs incurred in this action.

RAY, QUINNEY & NEBEKER and
C. PRESTON ALLEN, and
RICHARDS, BIRD & HART
By RICHARD L. BIRD, JR.
Attorneys for defendants

Upon these pleadings the trial was had before the Hon. A. H. Ellett and the judgment entered in behalf of the defendants Smith on their counterclaim, and the action of plaintiff was dismissed, and to set aside said judgment this appeal is taken.

The properties involved in this suit are in lots 1 and 2, Bradford Subdivision, Salt Lake County, and the history covering the same is as follows:

Bradford Subdivision was dedicated in 1911 and one William H. Linnell obtained title to the ground involved as a common owner on June 30, 1925. Linnell sold all of lot 1 and the east 10 feet of lot 2 to the defendants Smith in this action in 1939 at which time they moved into the premises and lived upon the same until January, 1950 and rented to various tenants until June 8, 1954 when they sold by Uniform Real Estate Contract all of lot 1 and the East 10 feet of Lot 2 to the defendants Manning who have resided at the premises since 1954 but title still stands in the name of defendants Smith.

Linnell, on September 5, 1944, deeded lots 1 and 2, together with other property to Zion's Savings Bank and Trust Company, with Zion's issuing a deed to defendants

Smith on January 25, 1945. Zion's then sold all of Lot 2 except the east 10 feet thereof to Bert A. and Dora M. Hughes on March 28, 1945 and these parties then deeded to Ida Elaine Hughes on May 31, 1945, and Ida Elaine Hughes then deeded to Fred J. Peterson and Afton G. Peterson on April 26, 1948. These said Petersons then erected a house on these premises and deeded to the plaintiff herein, Edward A. Knaus the west 44.46 feet of Lot 2 on April 28, 1951 leaving a strip of ground 1.06 feet wide between the two properties. The said Petersons then deeded the 1.06 foot strip to the plaintiff Edward A. Knaus on July 15, 1958. On August 15, 1955 plaintiff Knaus sold under contract to one Ira Packard and his wife the aforesaid 44.46 feet of lot 2. The said Packards resided on the premises until July 11, 1958 at which time the Knaus-Packard contract was mutually terminated and a quit-claim deed was given to Knaus by the Packards. Shortly after August 5, 1955, Packard, as a contract purchaser, started discussing the question of his boundary line location with the contract purchaser of defendants Smith, namely, the defendant Manning, and Manning had a survey made to determine the location of the west line of the east 10 feet of lot 2 by Bush and Gudgell on August 7, 1956.

Defendants Smith apparently were purchasing under a uniform real estate contract from one William H. Linnell the property known as Lot 1 and the East 10 feet of Lot 2, and also the east 64.1 feet of lots 31 to 34 inclusive of Bradford Subdivision. The frontage distance of all of lot 1 and the east 10 feet of lot 2 is 64.1 feet which is the same distance as the width of the lots to the rear, thus

the east and west lines of the purchased property would be 64.1 feet in east and west width. The area in dispute is a strip of ground 6 feet wide on the north and 7.68 feet wide on the south and being 221.57 feet in length in a north and south direction. This particular property is immediately west of the west line of the east 10 feet of lot 2, and at the time of the purchase by Smith from Linnell was a driveway then used by the common owner of all of the ground, William H. Linnell.

All of lot 2, lying to the west of the strip of property in dispute was an open, uncultivated tract of ground until after August, 1948 when the then owner, Fred J. Peterson, had the ground surveyed so that he could erect a home upon the same, and the use of the disputed strip by both Smiths and Mannings was never questioned until 1955 when the contract purchaser of the land including the disputed strip to the west was purchased by Ira Packard who measured off the distance of his frontage and made claim that the roadway encroached upon his ground.

The chain of title as to the defendants' property is all by the same description, namely, all of lot 1 and the east 10 feet of lot 2, which description was originally carved out by the original common owner, William H. Linnell.

The question thus arises as to whether or not this is an action in which the doctrine of boundary by acquiescence should be applied.

At the trial plaintiffs introduced their abstract of title (Ex. P-1) brought to date as of March 23, 1959 showing that the plaintiffs are the fee owners of all lot 2, except the east 10 feet thereof of Bradford Subdivision.

POINTS TO BE ARGUED

POINT I.

THAT THE EVIDENCE DOES NOT SUPPORT THE JUDGMENT OF BOUNDARY BY ACQUIESCENCE.

(a) Property supposedly purchased.

(b) Access to property.

(c) Knowledge of west boundary.

POINT II.

THAT ANY CLAIM OF RIGHTS ACQUIRED BY DEFENDANTS COULD ONLY BE THE RIGHT OF AN EASEMENT.

POINT III.

THAT THE COURT ERRED IN RENDERING JUDGMENT AS IF THE ACTION WERE ONE FOR REFORMATION OF AN INSTRUMENT.

ARGUMENT

POINT I.

THAT THE EVIDENCE DOES NOT SUPPORT THE JUDGMENT OF BOUNDARY BY ACQUIESCENCE.

(a) Property supposedly purchased.

At the trial the deposition of defendant James Earl Smith dated March 27, 1959 was introduced in evidence.

Direct examination of James Earl Smith by Mr. Bird: (Deposition - page 4, line 25.)

Q. With reference to that area particularly and

the west side particularly was there any conversation between you and Mr. Linnell?

A. Well, I don't recall specifically what was said but I but definitely understood the driveway was included in the property.

Q. Did you walk over it?

A. Yes.

Q. Did he refer to it or what happened that gave you that impression?

A. Well, it was there and it seemed to fit the description of the property as I recall. Well, I knew it did or I wouldn't have bought it.

Q. You don't remember whether he said anything about that or not?

A. Well, I don't recall specifically although I did understand that it was on a straight line.

Q. On the west?

A. Yes, on both sides.

Cross examination of James Earl Smith Mr. Beatie: (Deposition - page 20, line 11.)

Q. I will ask you if in question number nine which was asked you as follows: "state what the representations to that effect were and who made them?" To which you answered, "well, I bought the property from Mr. Linnell," and you spelled out Linnell - "and his agent was Zions Trust and Savings Bank. Mr. Delbert Smith was the agent for the bank. I don't recall anything specific about the driveway that was said. I simply bought the property as described and it was assumed by everyone that the driveway was included in the description.

There were no contrary representations." Did you so answer?

A. Yes.

Direct examination of James Earl Smith by Mr. Bird: (Deposition - page 9, line 24)

Q. You sold the property to Mr. Manning, and you have testified - did you show the property to Mr. Manning?

A. Yes.

Q. You and he went there together?

A. Yes.

Q. Was anyone else present?

A. Oh, I don't recall. Probably my wife—his wife, or maybe Mr. Olson, the agent, could have been at different times.

Q. You don't recall specifically?

A. No.

Q. Was there a conversation between you and Mr. Manning as to what property was being sold?

A. Well, just whatever the description stated and the driveway was included.

Q. Did you and he walk over the property?

A. Yes.

Q. Walked down the driveway?

A. Oh yes, I am sure we did.

Q. Do you recall any reference to the driveway, any conversation about it while you were there?

A. No.

Q. Do you recall anything which occurred which would be a basis of the statement which you have just made "that it was understood"?

A. No I don't. Nothing specific.

Cross examination of James Earl Smith by Mr. Beatie: (Deposition - page 29, line 3.)

Q. Does your contract of sale to the Mannings describe the property by the same legal description as you acquired the property as being all of lot 1 and the east 10 feet of lot 2 of Bradford Subdivision?
MR. BIRD: I object to that as not being the best evidence.

A. Whatever the official description is, if that is the official description, yes.

Q. I am asking you did you sell under your contract by the same description that you acquired the property from the Linnell estate?

A. Yes.

Direct examination of James Earl Smith by Mr. Bird: (Deposition - page 6, line 25.)

Q. How far to the south did that fence go, that east fence?

A. Oh, it went to the end of the property line, some - oh, 490-500 feet, whatever -

Q. The fence extended the whole length?

A. Yes. Well I could make a minor correction on that. There was a chicken coop that the fence ran into but the fence continued on the other side.

Q. Was there a fence along any part of the west boundary?

A. No I don't think there was.

Deposition of Lois Manning dated October 30, 1958, page 11, line 14.

Cross examination by Mr. Allen:

Q. There was no indication, I take it, then, from your testimony here, by either the Smiths or any real estate broker or salesman, as to the place or the position where the west property line of the property came to, is that correct?

A. That is right.

Cross examination of defendant R. V. Manning by Mr. Beatie: (R. 133, line 22)

Q. Mr. Manning, I believe that if you will look at this copy, photo copy, can you tell me, is that your signature and that of your wife on the last two lines on page 2 as the purchasers?

A. It is.

Q. And you had read this contract, knowing what property you were to acquire, did you not?

A. I left that up to Ken Olsen at First Security, I might have read it. If I do, I never paid any attention to it.

MR. BIRD: Will you speak up Mr. Manning, I can't hear you.

A. I told him that I might have read it but I don't remember what was in there.

Q. Well you understood you were to get all of lot 1 and the east 10 feet of lot 2 of Bradford Subdivision, a subdivision in Murray, Utah?

MR. BIRD: We will stipulate that he expects to get the property described, that that is what he was purchasing, if that will help. I don't know what it is you want.

It is apparent from the above testimony that James Earl Smith and his wife intended to purchase 64.1 feet of frontage on 48th South Street, Salt Lake County, Utah, and that the said footage is included within the legal description of Lot 1 and the East 10 feet of Lot 2, Bradford Subdivision, Salt Lake County, Utah. Further, that the east and west boundary of the ground purchased by the Smiths from Linnell were straight, parallel lines.

Exhibit P-17 which is the uniform real estate contract between defendants Smith and Manning is the same description, namely, all of Lot 1 and the East 10 feet of Lot 2, Bradford Subdivision, as the property described by deed from Zion's Savings Bank & Trust Company to defendants Smith, dated January 25, 1945.

The evidence of ownership of the grounds of the defendants by the deed from Zion's Savings Bank to Smith and the contract of purchase by Manning from Smith (Exhibit P-17) does not show that the boundaries of the land of plaintiff and defendant were ever established or located by any reference to the old wire fence on the east side of the Linnell property or that said east fence in any way controlled or determined the boundary line between the land of plaintiffs and defendants.

At the time that Smith purchased from Linnell he could easily enough have described the property as being 64.1 feet in frontage from the wire fence on the east portion of the Linnell property and in that event there would have been no question as to the west boundary of the Smith property as including the property here under dispute.

That both Linnell, by deed to Smith, and Smith by contract with Manning have limited the property to all of Lot 1 and the East 10 feet of Lot 2, Bradford Subdivision.

Defendant Smith testified that the east wire fence ran into a chicken coop which extended farther east than the fence and that the fence then extended from the south wall of the chicken coop to his southerly line and that there was no fencing of the premises being purchased on the westerly side. Certainly the physical evidence of the east fence would indicate that the property being purchased by Smith extended further east than the fence as it then existed and that there is no testimony in this record indicating who erected the east fence or that Linnell considered it a boundary line between his property and the property adjacent to his on the east.

The inadvertence of Linnell and defendants Smith is analagous to the fact set forth in the case of MALOUF vs. FISCHER, 159 Pac. (2d) 881.

J. Turner at page 883 of the Pacific Report says:

> "The testimony of C. H. Fischer, father of the defendant Catherine W. Fischer, who conveyed

the property to her, shows that he loaned the money to the Tyng Investment Company with which it constructed the brick building in question and that he has been familiar with the property ever since that time, 1913 or 1914; that when he took title to the property he assumed the east boundary line consisted of the east wall of the building and running thence north to the north property line; that other than this law suit, no one ever questioned this boundary line and at no time did any predecessor in interest of plaintiff complain to him that his building encroached to any extent on plaintiff's property. There is ample testimony showing that extending north of the east wall of the building there is and has been no fence, wall or other barrier or monument marking a line northerly from the northeast corner of the building, but that the property to the north is open and has for years been used as parking space."

The testimony in this action indicates that the driveway extending from 48th South to a point west of the red barn then on the premises was in use by the common owner Linnell for his own benefit and that the west boundary of the driveway was marked only by a gravel portion in the front part and cinders spread upon the ground in the rear portion.

(b) Access to property.

Direct examination of James Earl Smith by Mr. Bird: (Deposition - page 7, line 28)

Q. Was there any other way getting to the garage on your property?

A. No.

Cross examination of James Earl Smith by Mr. Beatie: (Deposition, page 20, line 23)

Q. I will ask you now if you were asked question number ten in that deposition as follows: "Was it necessary for you to use said driveway in order to get in and out of the garage which you were then using?". To which you answered, "Oh yes."
Did you so answer?

A. Yes.

(Direct examination of R. V. Manning by Mr. Bird: (R. 90, line 11)

Q. What other means of access to the rear portion of the lot was there?

A. There wasn't any, except the roadway, the driveway and the road that went back there.

Statement of Complaint filed August 19, 1957 by defendants Manning in Case No. 113422.

Paragraph 8.

> "That there is no other reasonable or practical means of ingress or egress to/from certain portions of plaintiffs' property and that said right-of-way in question was and is a right-of-way of necessity for the use of plaintiff."

A comparison of Exhibit D-4 showing the condition of the road and approach to the rear of the premises in 1955 as compared with Exhibit D-14 which shows the present condition of the black-topping to a now erected carport, distinctively shows that there was sufficient

access to the premises and the garage thereon within the boundaries of the property of Lot 1 and the east 10 feet of Lot 2, Bradford Subdivision. Exhibit D-14 shows the excess here in dispute and to the west of the black-topped area.

It will be conceded that the original roadway as shown in Exhibit D-4 was more convenient for access but was not necessary for access.

(c) KNOWLEDGE OF WEST BOUNDARY.

Direct examination of Robert C. Reid for plaintiffs in rebuttal. (R. 175, line 12)

Q. Did you ever have a conversation about the time that Mr. Earl Smith was selling what is now known as the Manning property with Mr. Smith at the property?

A. Yes.

Q. And will you relate first approximately when that was, please, Mr. Reid, who was present, and what was said at that particular conversation?

MR. BIRD: Let's have one question at a time if we may, please. I object to the multiple question.

MR. BEATIE: All right.

Q. Can you tell me approximately the time of the conversation, Mr. Reid?

A. The time of the conversation?

Q. Yes, I mean in the year.

A. It was in 1954.

Q. 1954?

A. Oh huh

Q. All right. Can you tell me where the conversation took place?

A. At the back of my property and on the west of Mr. Smith's property.

Q. All right. Who was present?

A. My father, Mr. Clifton L. Reid, and myself and Mr. Smith.

Q. What were you doing at that particular time, Mr. Reid?

A. I was installing a corner post for a fence on my property and—shall I continue with the story?

Q. Yes, go ahead.

A. And Mr. Smith came out to me as I was placing the corner post at the northeast corner of my property—

Q. Yes?

A. —and said — probably said "hello" first. I can't remember. It was a little while ago.

Q. Just give us the substance of the conversation.

A. And he said—wanted to know if I was aware that my property line extended further east than what I was putting the hole for the corner post and I told him I did, I knew that, but for right now I was just interested in only taking that much—fencing that much in.

Q. Why were you fencing the area at all, for what reason?

MR. BIRD: I object to it as immaterial.

MR. BEATIE: It isn't immaterial, your Honor.

THE COURT: Go ahead. You may answer.

A. I was getting the boy a Shetland pony, and I wanted to fence it in there on my place.

Q. Did you tell Mr. Smith anything about why the holes were being dug at the point at which you were placing the post?

A. No, only I decided to put them there, and I was satisfied, but I did know that that was not the property line.

Conversation of witness and defendant Manning. (R. 180, line 14)

Q. Just tell what was said, Mr. Reid. That's all that is pertinent.

A. Fine.
THE COURT: What did he say? "Bob" —

A. He said, "Bob, I have been talking to Mr. White here about this property line and so on out here." He said "I understand that Mr. Packard's been running around the neighborhood telling everyone I am a land grabber and so on," and I said, "I wasn't aware of that, but I understand that there is some confusion over the property line," and he said, "yes," he said, "but" — and he said, "the boy was out here moving the fence and," he said "I thought I will just drop out and tell him that his energy is being wasted because I was going to have this fence moved tomorrow." That was Sunday evening that he was telling me this. "Tomorrow I am having this fence moved according to my survey that I have had made," and pointed out to the stake at

the back and also mentioned the stake up at the front and getting in line with the stake at back and looking towards the front, and then discussing my property line he said "Would it be all right if I have them—if I move your fence out to this line and then you just fill in the sides?" And I said, "Yes, that would be perfectly all right with me, fine."

(R. 181, line 11)

Q. I would ask one question. Was anything said with relation to which direction his fence was to be moved?

A. Oh, yes, to the east, yes, and then very friendly he said—

MR. BIRD: What was that word?

A. Very friendly he said, "Why, Bob" — no, there was a discussion about how many feet east my fence should be moved, that is, in line there with his survey, you know, and he said "Well, it must be about" — one of us said, "It must be about seven or eight feet or something like that," and he said, "Well," he said, "I know it comes way over here, Bob, almost to this peach tree."

Direct examination of Lenn H. White for plaintiffs in rebuttal. (R. 192, line 27)

Q. And where—withdraw that. When did you purchase the property at that address?

A. I think it was 1949.

Q. 1949. And at the time of the purchase, did you purchase at the same time Mr. Reid, your adjacent neighbor to the north, purchased?

A. Yes.

Q. And at the time both of you purchased, was there a survey run in by the bank through whom you purchased to determine your east property line and that of Mr. Reid?

Q. And was there any evidence of your east line that was marked on the property at that time?

A. Yes. There was a stake, there was a wooden stake there, and then I secured an iron stake from the company I work for and was about a three-quarter rod, and I drove it in the ground next to that stake.

Q. How long did that stake stay there to your knowledge, Mr. White?

A. It was there until just before Mr. Manning tore down the barn and started to level off his property so he could use it.

Q. Coming now to 195—after '54 and at a time when Mr. Reid had erected a fence across the east border of his — or a fence along the east end to enclose his place for his horse, did Mr. Manning and you have a conversation in order that there may be a fence connection from Mr. Manning's southeast corner southerly?

A. Yes.

Q. Will you just relate first of all where the conversation took place?

MR. BIRD: Don't you mean Mr. Smith?

MR. BEATIE: I mean Mr. Manning.

A. Yes. Mr. Manning and I — I was out in the yard I believe, and he came over to me, and he told me he was getting —

MR. ALLEN: Excuse me, Mr. White. We can have our same objection, I suppose, to this?

THE COURT: Yes. It is understood it goes for all.

A. Mr. Manning came over and told me that he was getting a horse for his boy and did I have any objections to him running a fence on along south and connecting onto Bob's and I told him, "I own no part of Mr. Reid's property. He put that in solely himself," and if he wanted to hook onto the fence, he ought to see Mr. Reid, but that the true property line is about six feet east of this —

THE COURT: Are you telling me facts or what he said? I don't want you to interpose a fact in with the conversation. You are telling me the conversation. When you finished with the conversation, stop. I'm not sure.

A. No sir. This is what I am telling Mr. Manning.

THE COURT: All right, go ahead then.

A. So I told him that the true property line was about six feet east of that particular post, and he said well, he wasn't concerned with that, he just wanted to hook up a temporary fence so his boy could have a pony; and I told him as far as I was concerned it was perfectly all right, I had no business thereon, and so he put the fence up.

Q. At that particular time was the red barn still in existence?

A. Yes, it was.

Q. Q. Where was the metal stake which you have referred to with relation with the west side of the red barn, Mr. White?

A. It was about four feet from the red barn.

Q. That would be from the west side of the red barn?

A. That's correct.

Direct examination of Ira Packard for plaintiff on rebuttal. (R. 201, line 23)

Q. Will you relate, please, if you can, when that conversation was had?

A. I can't determine an exact date because I had no reason to remember it exactly. It will come to my memory in this respect that it was in the summertime or at least during hot weather because of the reason Mr. Manning asked if he could move the trailer from its position, which was out in the bright sun, behind, immediately behind the garage at that particular time over into the shade of these trees which are as you see in the picture. The trailer is under the trees, and it was in the shade, out of the weather, out of the sun.

Q. Now, was that conversation which you had, merely to try and tie it to time, prior to the construction of a carport?

A. Yes sir, prior to the construction of this new carport, yes.

Q. At any time during the construction of that carport did you have any conversation with Mr. Manning as to the location of his carport?

A. Yes sir.

Q. Will you relate, please, any conversation. If you had more than one, relate when the first was, who was present, and what was said.

A. Reference to the location of the carport, Mr. Manning sent his son over to my house and

asked me to come over to his house, which I did, and in his kitchen in front of his wife and —himself, his wife, and I, he told me that his conscience was bothering him a little, and he would like to explain something to me concerning the carport which was under construction. They were at that time pouring the cement foundation for the carport. He told me that he was constructing the carport within eighteen inches of the property line and asked if I had any objection, and I said "no, I have no objections to being that close to the property line as long as it doesn't — as long as the roof doesn't drip water over onto my property," which I understood at that time was low.

(R. 207, line 8)

Q. If you will relate then, please, if you can, as to time, place and conversation that was had with relation thereto.

A. The time was just prior to the construction or the laying of the blacktop driveway. Actually in my recollection that is when this whole thing started, was Mr. Manning told me that he was going to put a blacktop driveway into his new carport, and I told him at that time as I said it had been jokingly discussed that "you had better get a survey because I think you are driving on my property." That is this old driveway that's been discussed, which he did, and he then moved, as I recall it, moved the driveway to the east prior to blacktopping it, and I planted lawn and shrubbery in that area.

Q. I hand you what has been marked for identification Exhibit D-14 Mr. Packard, and will ask you if you can identify the area which

you have just been discussing as is being shown on that particular exhibit.

A. The area that I planted?

A. Yes sir.

A. Yes, sir. This row of weeds or shrubs right here is the area. From that area over to approximately a foot west of the fence as shown in here is the area I planted. It is also shown in the other photograph without the fence.

Cross examination of defendant R. V. Manning. (R. 131, line 20)

Q. Mr. Manning, did you ever offer in 1956 when your carport was erected to purchase the ground to the west of the carport from Mr. Ira Packard and his wife?

A. Yes sir.

Exhibit P-15.

"September 5, 1956

Dan E. McArthur, D.D.S.
700 East 4800 South
Murray, Utah

Dear Dr. McArthur,

Enclosed is a certified copy of a survey made by Bush & Gudgell, surveyors of our city. You will note from this survey that the west property line of your property is several feet east of the present position of your fence and that your fence is located on R. V. Manning's property.

Chapter 78-12-12, of the Utah Code Annotated, 1953, reads as follows: 'In no case shall adverse possession be considered established under the provisions of any section of this code, un-

less it shall be shown that the land has been occupied and claimed for the period of seven years continuously and that the party, his predecessors, and grantors have paid all taxes which have been levied and assessed upon this land according to the law.' Taxes have been assessed on the legal description of this property and Mr. Manning or his predecessors in title have paid the taxes continuously for a period in excess of seven years, therefore, your possession of his property has not been adverse under the Utah law.

Demand is hereby made that you vacate said property of R. V. Manning, forthwith, or an action for ejectment will be brought against you.

Very truly yours,

Ronald C. Barker"

It is undisputed that in 1954, when Smiths were selling to Mannings, defendant Smith knew the westerly extent of his property. This is born out by the testimony of Robert C. Reid, who was erecting a fence in the easterly portion of his lot, which is immediately adjacent to the Smith ground, and the conversation between Reid and Smith indicated that Smith's west boundary line, which is a straight line, was 6 to 8 feet further east from where Reid was placing his fence. Reid testified that he knew where he was placing the fence was 6 to 8 feet further west than his east boundary line.

The fact is further corroborated by the testimony of Lenn H. White that in 1949 his east boundary line was indicated by a stake which was then supplemented by a steel rod and that this steel rod would be about 4 feet west of the red barn then on the Smith property. This steel

stake coincides with the measurements shown on Exhibit D-6 which is the survey made August 7, 1956.

The foregoing testimony shows that Mr. Smith knew his west property line in 1954 in his conversation with Mr. Reid and that Mr. Manning knew the location of the west boundary line in his conversations with Robert C. Reid and Lenn C. White. Further, Mr. Manning knew the west boundary line when he requested permission for the parking of his trailer on the disputed area and a conversation with Mr. Packard as to the location of his carport being within 18 inches of the property line and a further conversation with relation to the planting of the area west of the blacktopping and Exhibit P-15 by which claim is made upon Mr. McArthur to remove a fence from the property then being occupied by Manning.

In the case of HOLMES vs. JUDGE, 31 Utah 269, 87 Pac. 1009. J. Frick at page 281 of the Utah Report says:

> "We do not wish to be understood as holding that parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest."

In the case of PETERSON vs. JOHNSON, 84 Utah 89; 34 Pac. (2d) 697. J. Elias Hansen at page 93 of the Utah Report said:

"The mere fact that the defendant's predecessor in title enclosed within his fence a strip of land not covered by his deed and that such fence has been maintained for a long period of time does not vest title in such land in the defendant."

In the case of NELSON vs. Da. ROUCH, ETUX, 87 Utah 457; 50 Pac. (2d) 273.

J. Moffat, at page 466 of the Utah Report said:

"At no time after the division of the property by the common owner does it appear that adjoining owners participated in attempting to establish a boundary. As between the present owners the only time the evidence reveals a discussion as to boundary it was agreed to have a survey made and abide by the true boundary so established. The fact of locating a building or a fence or other structure that may later take on the nature of a monument, in the absence of, or without the knowledge of, the adjoining owner, or upon a supposition that such location is the true boundary line when in fact it is not, and when no express agreement or long acquiescence is shown, does not establish a boundary line different from the true one. Peterson v. Johnson, 84 Utah 89, 34 P. (2d) 697."

In the case of BRIEM, ET AL vs. SMITH, ET AL., 112 Pac. (2d) 145; 100 Utah 213.

J. Wolfe at page 146 of the Pacific Report said:

"As the common owner of the two he had the full and unlimited power to make any and every possible use of the property. When, in September, 1920, he conveyed to defendants, he had the power to convey all or any part of his land. He conveyed one lot to them according to the same survey de-

scription by which it had been previously described. Any boundary line between the two properties other than the line described in that deed, had its origin, if at all, at or after that time.

In the case of BROWN vs. MILLINER, 232 Pac. (2d) 202.

J. Wolfe at page 208 of the Pacific Report said:

> "The fact that a land owner allows others to share with him the use of his land does not necessarily signify a disclaimer of ownership. And this is perhaps even more true when, as in the instant case, the location of the true boundary does not appear to have been known to the adjoining owners. A person should be presumed to claim title to all the land called for by his deed unless it clearly appears otherwise."

Defendant Manning testified that at the time of the erection of the carport he offered to purchase from the Packards the disputed strip of ground. This fact is inconsistent with any theory that there was uncertainty or a dispute as to where the boundary line was located.

The west boundary of the disputed strip never had any monumental markings other than the irregular edge of the roadway (Exhibits D-8, 9, 11 and 12) until after the erection of the carport and the decision in Case No. 113422 when a wire fence was erected by defendants Manning (Ex. P-20) and said wire fence was subsequently replaced by a redwood fence (Ex. D-14).

It is apparent that the conduct of all parties concerning the disputed strip since the severance of the first

piece of property from the common owner in 1939 has been inconsistent with any inference as to the existence of an agreement of boundary or acquiescence in a boundary line until the question of the boundary was raised by Ira Packard in 1956 when the old garage at the rear of the Manning house was removed and a carport built for the convenience of the defendants Manning. The carport was constructed with a solid south wall and in such a manner that it then became necessary to have at least a 6 foot strip to the west of the carport for the purpose of ingress and egress and at that time it became an important issue between the adjoining property owners.

POINT II.

THAT ANY CLAIM OF RIGHTS ACQUIRED BY DEFENDANTS COULD ONLY BE THE RIGHT OF AN EASEMENT.

Statement from Complaint of defendants Manning filed August 19, 1957 in case No. 113422.

Paragraph 4.

> "That Plaintiff and his predecessors in title have maintained and have been in possession of a gravelled right of way over a certain disputed strip of land which lies between the properties of plaintiff and defendant, which strip of land is in excess of 20 feet in width."

Paragraph 5.

> "That said right of way is appurtenant to certain portions of plaintiff's land which are adjacent to defendant's land."

Paragraph 6.

"That plaintiff and his predecessors in title have used this right of way openly, notoriously, peacefully, and adversely to defendants and their predecessors in interest for a period of time in excess of twenty years and that the plaintiff claims title to an easement over said right of way by prescription, or alternatively alleges that he is equitable owner thereof and entitled to exclusive possession thereof."

Statement from Affidavit of defendants Manning filed August 19, 1957 in case No. 113422.

Paragraph 3.

"That the defendant has obstructed, does now obstruct, and does threaten to continue to obstruct plaintiff's rightful use of the subject right of way."

Paragraph 4.

"That defendant has threatened to use physical violence against plaintiff to prevent him further use of the subject right of way."

Paragraph 5.

"That plaintiff and his predecessors in title have made continuous and interrupted use of said right of way in excess of twenty years and have not been hindered therein until the last few days."

The aforesaid statements from action 113422 of the Third District Court files clearly show that as of August 17, 1957, defendants Manning considered the disputed area in this suit a matter of right-of-way.

In the case of HARKNESS vs. WOODMANSEE, 26 Pac. 291; 7 Utah 227.

C. J. Zane at page 232 of the Utah report said:

> "Where a person opens a way for the use of his own premises and another person uses it also without causing damage, the presumption is, in the absence to the contrary, that such use by the latter was permissive and not under a claim of right."

In the case of JENSEN vs. GERRARD, ET AL., 39 Pac. (2d) 1070; 85 Utah, 481.

J. Ephraim Hansen said at page 487 of the Utah report:

> "A 20 year use alone of a way is not sufficient to establish an easement. Mere use of a roadway opened by a land owner for his own purpose will be presumed permissive."

It is respectfully contended that the use of the disputed strip was created by the common owner William H. Linnell and that from 1939 until 1945 while the defendant Smiths occupied the premises as owners of the east tract that the common owner William H. Linnell was still the owner of the adjacent property to the west upon which the disputed strip is located and that during this time the use of the disputed strip by the defendants Smith would only be permissive of Linnell. That as late as 1954 Smith knew the west boundary of his land which was a straight line in his discussion with Robert C. Reid who was erecting a fence in the rear portion of his lot, which Reid property in adjacent on the west to the Smith property.

That if the use of the disputed strip was adverse from 1939 until the commencement of this action on September 29, 1958, that a 20 year period for the prescriptive right of an easement had not elapsed by which the defendants could have acquired even an easement in the disputed strip of ground.

POINT III.

THAT THE COURT ERRED IN RENDERING JUDGMENT AS IF THE ACTION WERE ONE FOR REFORMATION OF AN INSTRUMENT.

The Court indicated its thinking at the conclusion of the testimony as follows:
(R. 240, line 27)

> THE COURT: Well, I will tell you how I feel about this, and then you can take the laboring oar as you wish to.
>
> I don't think there is anything to this res adjudicata business. I think it is lawsuit that has to be tried over because somebody didn't make these owners the parties in interest, but I don't think that there is any question at all but what this lawsuit would be just the same as if it were between Linnell and Smith, that what Mr. Knaus and his predecessors in interest bought has no bearing because whatever Linnell gave and whatever Linnell held is determinative of the rights of Smith. Smith bought first out of the common piece, and I think there is no question that I could find any way other than to give Smith his land that was marked off on the ground at the time from the old fence. The fact that the new survey pushes that fence six feet or so to the east I think is nothing. He couldn't have got that except by purchase from the

doctor on his cast, and the fact that he's bought that doesn't change the situation at all.

I looked at the place, and I can't see what earthly use that strip of ground to the west of his driveway is going to do him. I don't know why these parties couldn't get together. Mr. Knaus could use it. He can move his fence over and have a bigger lawn, but the Smiths aren't going to get any benefit out of having split lawn west of that driveway. I think I have got to give him judgment over to the distance 6.7, or whatever it is, feet west of where the present ten feet of that lot 2 shows on the scale. I think I have got to give him what he bought, but what good would it do? Why doesn't he get his money back for what he paid for his 6.7 feet? Why could we have this kind of fuss?

It is the contention of appellants that the judgment in this suit has been rendered for the reformation of a deed instead of under the theory of boundary by acquiescence. This contention is corroborated by the aforesaid statement of Judge Ellett at the conclusion of the trial.

In the case of REESE, ET UX vs. MURDOCK, ET UX, 243 Pac. (2d) 948.

J. Wade said at page 951 of the Pacific Report:

"Nor is this a case to correct descriptions of a deed placed therein by mistake and cannot be made such because the grantors in these deeds are not parties to the action."

In the case of SMITH vs. NELSON, 197 Pac. (2d) 132; J. McDonough, at page 134 of the Pacific Report says:

"This action is not one for reformation of a deed. If it were, Aaron Jackson and wife or their personal representatives, would be necessary parties to such action."

If this suit is the same as if it were between Linnell and Smith as quoted by Judge Ellett, then it is apparent that William H. Linnell, who made the original sale to Smith or his representatives, and Zion's Savings Bank and Trust Company who issued the deed to Smith in 1945 are necessary parties to the action in order to determine what ground was sold in 1939.

CONCLUSION

It is respectfully contended that the Court erred in entering judgment as he did in this action and that the judgment should be reversed with instructions to enter Findings of Fact, Conclusions of Law, and Decree in favor of the appellants as to the disputed strip of ground in this action.

Respectfully submitted,

W. D. BEATIE

Attorney for appellants and plaintiffs